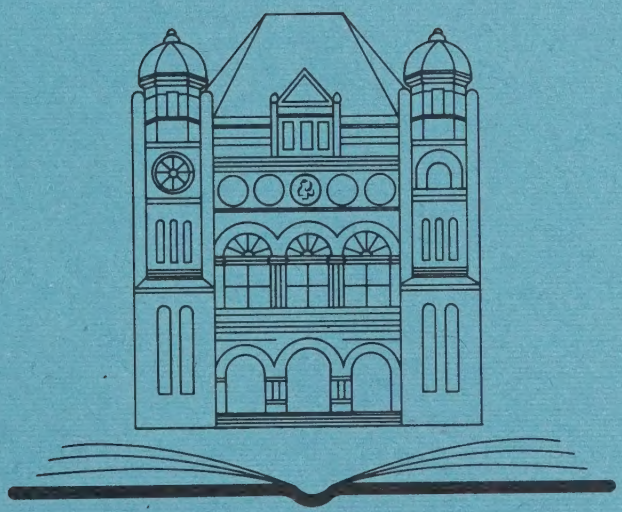
AN OVERVIEW OF BILL 79, THE EMPLOYMENT EQUITY ACT, 1993

Current Issue Paper 143



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AN OVERVIEW OF BILL 79, THE EMPLOYMENT EQUITY ACT, 1993

Current Issue Paper 143

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INTRODUCTION

Bill 79, the *Employment Equity Act, 1993*, was introduced in the Legislature by the Hon. Elaine Ziemba, Minister of Citizenship, on June 25, 1992. This Current Issue Paper — one of a series by the Legislative Research Service on employment equity — provides an overview of the bill, divided into four parts:

- the principles and application of employment equity;
- obligations;
- administration and enforcement; and
- other issues.

A question-and-answer format is used, with the relevant sections of the bill and the Draft Regulation (Dr. Reg.), which was released on June 16, 1993, listed next to headings where appropriate. All section references are to the bill, unless otherwise indicated.

As the intention is to provide an overview only, every section and subsection of the bill have not been summarized. For a complete understanding of the legislative provisions, resort should be made to the legislation itself. It should also be stressed that the intention of the paper is to explain, rather than to assess, the content of the legislation.

PRINCIPLES AND APPLICATION OF EMPLOYMENT EQUITY[1]

What are the principles which underlie Bill 79?

The rationale for the legislation, as stated in the bill, can be found in the preamble and in Part I's formal identification of "employment equity principles."

Preamble

The preamble declares that disadvantage in employment is experienced by the four designated groups — Aboriginal people, people with disabilities, members of racial minorities, and women. More particularly:

- These groups experience higher rates of unemployment than other people in Ontario;
- They experience more discrimination than others in finding and retaining employment, as well as in being promoted. As a result, they are underrepresented in most areas of employment, especially in senior and management positions; at the same time, they are overrepresented in jobs which are low-paying and have little opportunity for advancement;
- The burden imposed on members of these groups and their communities is "unacceptable"; and
- This lack of employment equity exists in both the public and private sectors in Ontario, and is caused by "systemic and intentional discrimination."[2]

The preamble then defines the object of the bill as

> the amelioration of conditions in employment for [the four designated groups] . . . in all workplaces in Ontario.

Laws with the object of ameliorating conditions of disadvantaged individuals or groups are constitutionally protected from an attack based on s. 15(1), the individual equality rights provision, of the *Charter of Rights*. This protection is found in s. 15(2) of the *Charter* which reads:

> Subsection (1) does not preclude any law, program or activity that has as its object the *amelioration of conditions of disadvantaged individuals or groups* including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[3] [emphasis added]

Employment Equity Principles *(s. 2)*

Bill 79 sets out four broad principles of employment equity which are to apply throughout Ontario. The first two principles hold that

- Every member of a designated group is entitled to be considered for employment, hired, treated, and promoted free of barriers, including systemic and deliberate discriminatory practices and policies; and
- Every workforce, in all occupational categories and at all levels of employment, must reflect the representation of designated group members in the community.

The remaining two principles outline duties of employers as follows:

- Every employer must ensure that its recruitment, employment, and promotion practices and policies are free of systemic and deliberate barriers that discriminate against designated group members; and
- Every employer must implement positive measures for recruiting, employing, and promoting designated group members.

Entitlements *(s. 1)*

Prior to listing these principles, the bill states that members of the designated groups are "entitled to be considered for employment, hired, treated and promoted in accordance with employment equity principles". S. 1 also restates and adopts principles set out in the *Human Rights Code*[4] by recognizing the entitlement of "all people" to equal treatment in employment in accordance with the *Code*.

How is membership in a designated group defined? *(Dr. Reg., ss. 1, 2, and 6)*

The Draft Regulation defines the designated groups as follows:

- Aboriginal people — persons who are members of the Indian, Inuit, or Métis peoples of Canada;

- people with disabilities — persons with a persistent impairment (physical, mental, psychiatric, sensory, or learning) who, by reason of that impairment
  - consider themselves to be disadvantaged in employment; or
  - believe that an employer or potential employer is likely to consider them to be disadvantaged in employment;
- members of racial minorities — persons who because of their race or colour are in a visible minority in Ontario. The fact that a person is an Aboriginal person does not make that individual a member of a racial minority;
- women (there is no formal definition) — all women, including Aboriginal women, women with disabilities, and women who are members of racial minorities are included as members of this designated group. A person thus may be a member of more than one designated group.

From a comparative perspective, the only existing Ontario regulation on employment equity plans — the one under the *Police Services Act*[5] — provides for the same designated groups (known as "prescribed groups"), but defines two of the groups differently, as illustrated by the following:

- persons with disabilities — persons with a permanent condition (physical, mental, or medical) that limits them in the kind or amount of activities of daily living and work they can do;
- members of racial minorities — persons, other than aboriginal persons, who because of race or colour, are in a visible minority in Canada that is non-Caucasian in race or non-white in colour.[6]

Which employers are bound by the bill?

Categories of Employer *(s. 3)*

The bill identifies three categories of employers:

- the Crown in right of Ontario, which is considered to be the employer of the Ontario Public Service;
- the broader public sector. This term is defined to mean the employers named in the Schedule to the *Pay Equity Act*[7] (such as municipalities, school boards,

colleges, universities, hospitals, and boards of health), plus any other employers designated in the regulations; and

- the private sector employer. This term means any employer other than those falling under the two categories listed above.

The Office of the Legislative Assembly and Members of the Assembly are named in the Schedule to the *Pay Equity Act* and accordingly are considered to be part of the broader public sector.

Statistics on the number and percentage of employers and employees in each of the above three sectors (as identified by the Office of the Employment Equity Commissioner) are reproduced in the Appendix to this paper.

Application of Bill *(ss. 3(4), 6)*

The application of Parts III — *Obligations*, IV — *Enforcement*, and VI — *Miscellaneous and Regulations* varies, depending on the employer in question. The general rule is that these Parts apply to all employers in Ontario, except for employers in the broader public sector who have fewer than 10 employees and private sector employers who have fewer than 50 employees, on the "effective date." (Also excluded are federally-regulated employers, such as banks and broadcasting companies.)

The bill defines "effective date" to mean the date on which s. 11 (the employment equity plan) comes into force; s. 11 comes into force on a day to be named by proclamation of the Lieutenant Governor.

A special provision governs the calculation of the number of employees that an employer has on the effective date. It is either the actual number of such employees or the greatest number of employees during the previous year; the higher number must be selected.

By way of comparison, Bill 172, the *Employment Equity Act, 1990* — a private member's bill introduced by Bob Rae in May 1990 prior to becoming Premier — would have applied to all employers in the private and public sectors with an annual payroll of more than $300,000.[8]

Are there any exemptions for those employers bound by Bill 79?

Aboriginal Workplaces

(s. 19(1); Dr. Reg., s. 4(1))

The Lieutenant Governor in Council may, by regulation, vary the application of any of the provisions of Part III and the regulations as they apply to Aboriginal workplaces.

In June 1992 the Office of the Employment Equity Commissioner noted in *Opening Doors: A report on the Employment Equity Consultations* that aboriginal participants felt that they had benefitted most from programs designed by and for them. The report continued:

> The principle of employment equity had the support of Aboriginal participants provided that it is developed in a manner consistent with the goals of self-government. It must reflect a holistic approach addressing issues of education, training, social and economic development and cultural identity. It must serve to help strengthen Aboriginal communities and further Aboriginal self-government. It therefore must be created by Aboriginal people, for Aboriginal people, in partnership with government.[9]

The Draft Regulation does not apply to Aboriginal workplaces.[#]

[#]It also does not apply to the construction industry. See s. 4(1).

Broader Public Sector and Private Sector

(s. 19(2)-(5); Dr. Reg., ss. 11(1), (2), 14(2), 21(1), 43(2), 45(1), 46(1), 48, 49(4))

Bill 79 also says that the regulations may provide certain exemptions to broader public sector employers with fewer than 50 employees, and private sector employers with fewer than 100 employees. Such exemptions may apply to any provision of Part III and the regulations. In addition, the regulations may impose less stringent requirements on these employers (who are categorized in the Draft Regulation as "small employers").

What is the time frame for complying with the bill? *(ss. 20, 21)*

Bill 79 prescribes certain timelines within which employers must have completed their initial workforce surveys and employment systems reviews, and prepared their first employment equity plans. These timelines differ, depending on the category and size of employer, and are found in Table 1 under the heading "Implementation". Table 1 also summarizes the above information on the application of Bill 79, including the exemptions for parts of the broader public sector and the private sector.

OBLIGATIONS

Part III of the bill defines the obligations of employers. These obligations encompass both the substance of employment equity as well as the process and are briefly outlined below.

Does the bill impose any general obligation upon employers to implement employment equity? *(s. 8(1))*

Yes. Part III begins by defining the general obligation of every employer to implement and maintain employment equity by recruiting, employing, and promoting employees in accordance with employment equity principles and the employer's employment equity plan.

TABLE 1
APPLICATION AND IMPLEMENTATION OF BILL 79

EMPLOYER	APPLICATION OF PARTS III, IV, AND VI	EXEMPTIONS	IMPLEMENTATION (surveys, reviews, plans)
Ontario Public Service	yes	no	12 months after "effective date"**
Broader Public Sector (50+ employees)	yes	no	18 months after "effective date"
Broader Public Sector (10-49 employees)	yes	yes, by regulation (permissive)	18 months after "effective date"
Broader Public Sector (1-9 employees)	no	N/A	N/A
Private Sector (500+ employees)	yes	no	18 months after "effective date"
Private Sector (100-499 employees)	yes	no	24 months after "effective date"
Private Sector (50-99 employees)	yes	yes, by regulation (permissive)	36 months after "effective date"
Private Sector (1-49 employees)	no	N/A	N/A
Ontario Provincial Police or any other police force governed by s. 48 of *Police Services Act**	no	N/A	N/A

N/A = not applicable

*Municipal police forces and the Ontario Provincial Police must prepare employment equity plans in accordance with s. 48 of the *Police Services Act* and the regulations under that Act.

**"Effective date" means the date on which s. 11 (the employment equity plan) is proclaimed in force.

What obligations do employers have to survey their workforces, and to review their employment policies and practices? Apart from any survey requirements, what records must be kept?

Workforce Surveys and Recordkeeping

(ss. 9, 17; Dr. Reg., ss. 5-13, 43-44)

Every employer must conduct employment equity workforce surveys and collect other information to determine the extent to which members of the designated groups are employed in the employer's workforce. Such surveys are to be carried out in accordance with the regulations. The principle of voluntary self-identification is recognized through the right of an employee to decide whether to answer questions contained in the survey. Under the Draft Regulation, a new survey must be conducted within nine years of the last one.

There is a separate obligation on employers to establish and maintain employment equity records for the workforce. Information in the records that concerns an employee's membership in a designated group must have been provided by the employee only.

Employment Systems Review

(s. 10; Dr. Reg., ss. 14-18)

All employers must review their employment policies and practices in accordance with the regulations. The purpose of the review is to identify barriers to the hiring, retention, and promotion of members of the designated groups, including terms and conditions of employment that adversely affect these employees. The review is also designed to enable the employer to remove such barriers.

The Draft Regulation states that a policy or practice contains a barrier if it has a direct or indirect negative impact on designated group members.

What must be included in an employment equity plan? *(ss. 11(1), 50(2); Dr. Reg., ss. 19-25, 28)*

Content of Plan: Bill 79

Every employer must prepare an employment equity plan that contains goals and timetables for the implementation of employment equity. More specifically, the plan must provide for

- the elimination of the barriers identified during the employment systems review;
- the implementation of positive measures with respect to the recruitment, retention, and promotion of members of the designated groups;
- the implementation of measures to accommodate members of the designated groups in the employer's workforce;
- specific goals and timetables for all the above matters;
- specific goals and timetables with respect to the composition of the employer's workforce; and
- any other matters prescribed by the regulations.[10]

A regulation governing the content of plans may require plans to contain numerical goals to be determined in a specified manner. In particular, it may provide that goals shall be determined

> with reference to percentages approved by the [Employment Equity] Commission that, in the opinion of the Commission, fairly reflect the representation of the designated groups in the population of a geographical area or in any other group of people. (s. 50(2))

In *Opening Doors* the Office of the Employment Equity Commissioner noted that "there was strong consensus that both numerical and qualitative goals are necessary to achieve employment equity."[11] The Office gave its understanding of the difference between goals and quotas:

> There is a difference between numerical goals and quotas. Numerical goals are flexible because they are determined according to several criteria, including opportunities for hiring and promotion in the workplace. The failure to achieve a goal does not automatically result in a penalty. Quotas, by contrast, usually are fixed numbers, externally imposed, with an automatic penalty if the quota is not met.[12]

Bill 172, the *Employment Equity Act, 1990*, was similar to Bill 79 in that it also incorporated the concept of numerical targets. It would have required every employer to develop an employment equity plan designed (1) to remove employment barriers; and (2) to achieve a fair representation of members of designated groups throughout occupational categories, to a degree that was at least proportional to the working age population of the region.[13]

Content of Plan: Draft Regulation

The Draft Regulation stipulates that every plan must provide for qualitative measures. As well, in the case of employers other than "small employers", the plan must set out numerical goals. These requirements are explained in the Regulation and an accompanying *Guide* as follows (unless otherwise indicated, all quotations are from the Regulation):

- **Qualitative Measures:** The *Guide* describes these measures as "way[s] of supporting or assisting workers" that are not tied to numbers.[14] The plan must provide for the "development and implementation" of such measures "that constitute reasonable progress" toward
  - eliminating the barriers that have already been found;
  - making, to the greatest extent possible, the representation of designated group members in each occupational group reflective of their representation in the working age population of the geographical area; and
  - maintaining a work environment that respects the principles of employment equity.[15]

These measures can include

- ways to help members of designated groups to be hired and earn promotions;
- ways to help workers by providing appropriate equipment or working conditions, such as flexible hours; and
- measures designed to eliminate discrimination and harassment in the workplace.

More specifically, measures to accommodate persons with disabilities might include

- communication and human support services, such as access to a sign language interpreter;
- technical aids and devices;
- changing the design of the job itself through such things as more flexible work hours or job sharing;
- modifying workstations by having, for example, special chairs or lower filing cabinets, and improving physical access to the workplace. Examples of the latter are wheelchair ramps or elevators.[16]

- **Numerical Goals:** A numerical goal is the proportion of the "opportunities for entry" (new hirings, promotions, or transfers to fill new or vacant positions) that will be filled by designated group members during the term of the plan.[17]

Each employer (other than small employers) must set numerical goals which

- will show "reasonable progress" toward making the representation of designated group members in each occupational group a reflection of their representation in the working age population of the geographical area; and
- can reasonably be met by working in good faith to carry out the qualitative goals set out in the plan.[18]

In setting numerical goals, employers must consider the following factors:

- Under-representation: This factor involves a comparison of (1) the proportion of designated group members in each occupational group; and (2) their representation in the working age population of the geographical area;

- Internal Availability: This category refers to the number of designated group members already working for an employer who currently qualify for, or whom the employer could reasonably be expected to train, to take a different job;

- External Availability: In general, this factor refers to the number of qualified designated group members in the geographical area. On a more specific level, in determining external availability employers may look at the proportion of designated group members who

    - are in the working age population in the geographical area;

    - are in the occupational group in the geographical area;

    - have the necessary skills for the particular jobs within the occupational group in the geographical area;

    - are graduating from educational and training programs in Ontario that give them the required job skills;

    - are in any other group for which the Employment Equity Commission provides data.

    As mentioned in the *Guide*, "some of the[se] factors will be more relevant than others in determining external availability."[19] For example, it points out that the working age population statistic may be the most relevant for unskilled, entry-level jobs; but for a position requiring a high level of skills (such as a physiotherapist), "the data on people with particular skills in particular occupational groups and those in educational programs would be more relevant."[20]

As mentioned earlier, the only existing Ontario regulation on employment equity plans has been made under the *Police Services Act*. This regulation provides for the setting of composition, hiring, and position goals, as well as goals for the elimination of barriers and for positive measures.[21] In general, a composition goal is determined in accordance with the principle that the percentage of "prescribed group" members employed in the police force should equal their representation in the community, subject to hiring opportunities.[22]

Format of Plan: Draft Regulation

The plan may be set up for the employer's workforce as a whole or separately for individual components, provided the plan is done for the whole workforce.

Is there any requirement to file a plan or report on its implementation? If so, with whom? *(ss. 11(2), (3), 18; Dr. Reg., ss. 45-49)*

Bill 79 requires the filing of plan certificates, but not the plans themselves, with the Employment Equity Commission. The Commission, however, may require an employer to file a copy of the plan.

Every employer must also submit reports and other information, as prescribed by regulation, to the Commission on

- the composition of the employer's workforce; and
- the development, implementation, review, and revision of the plans.[23]

What efforts must an employer make to implement a plan? *(s. 12; Dr. Reg., s. 26)*

Once a plan has been developed, an employer must make all reasonable efforts to implement it, and to achieve the plan's goals in accordance with the timetables set out in it. The Draft Regulation requires the plan itself to set out a monitoring process.

How long is a plan in effect? Must plans be reviewed and revised? *(s. 13; Dr. Reg., ss. 27, 29-30)*

Plans are in effect for three years and must be reviewed and revised by employers in accordance with the regulations. The same filing requirements apply to these revisions as to the original plans — that is, certificates respecting the revised plans must be filed with the Employment Equity Commission, unless the Commission requires a copy of the revised plan.

What provision does the bill make for the participation of employees in the employment equity process? *(ss. 8, 14-16; Dr. Reg., ss. 35-41)*

Consultation

Employers must consult with their employees on the development, implementation, review, and revision of the employment equity plan. The manner of this consultation is to be prescribed by the regulations.

Duty to Inform

Employers are also required to post in their workplaces such information about the Act and employment equity as may be prescribed by the regulations. The information must be posted in prominent places, and in such a manner that it may be read by all employees.

Training of Supervisory and Human Resources Staff

An employer must ensure that those responsible for recruiting, supervising, evaluating, or promoting employees are aware of and comply with the Act, the regulations, and the employment equity plan. Such individuals are specifically directed to work in accordance with the Act, the regulations, and the plan.

Bargaining Agent

The employer's responsibilities when a bargaining agent represents any of the employees are discussed under the next question.

What obligations exist when a bargaining agent, such as a union, represents any of the employer's employees?

Joint Responsibilities

(s. 14(2),(4); Dr. Reg., ss. 3, 9, 18, 31, 33, 34))

Where a bargaining agent is present, the employer and the agent must jointly carry out the responsibilities regarding

- workforce surveys;
- employment systems reviews;
- employment equity plans; and
- reviews and revisions of the plans

in respect of the part of the workforce represented by the bargaining agent.

These joint responsibilities are to be carried out in good faith, separately from the normal collective bargaining process and in the manner prescribed by the regulations.

Case of More than One Bargaining Agent

(s. 14(3); Dr. Reg., ss. 32-34)

Where employees are represented by more than one bargaining agent, the employer and the bargaining agents must establish a committee to co-ordinate the carrying out of their joint responsibilities. Membership of this committee shall consist of one employer representative and one representative of each of the bargaining agents.[24]

Amendment of Collective Agreement *(s. 14(5))*

Where the parties decide to do anything that conflicts with a collective agreement, they must amend the agreement to resolve the conflict.

Right to Information
(s. 14(6); Dr. Reg., s. 42)

Employers must provide bargaining agents with all information in their possession or control that is necessary for the agents' effective participation in the joint responsibilities process.

Disputes *(s. 27)*

Permissive and Mandatory Applications

Where an employer and bargaining agent are unable to resolve any matter that is their joint responsibility, either may apply to the Employment Equity Tribunal at any time to determine the matter. The employer, however, must promptly apply to the Tribunal if the parties have not carried out their joint responsibilities within the time required under Part III.

Orders of Tribunal

On these applications, the Tribunal may make any order it considers just in respect of the part of the workforce represented by the bargaining agent.

What significance does the bill attach to seniority rights with respect to a layoff or recall to employment after a layoff? *(ss. 5(2), 41(1)5)*

Seniority rights with respect to layoff or recall (when acquired through a collective agreement or an established practice of an employer) are deemed explicitly not to be barriers to the hiring, retention, or promotion of members of the designated groups. In other areas, such as training and promotion, seniority is not shielded by Bill 79 and may be challenged during an employment systems review.[25] A separate provision in the bill authorizes the Employment Equity Commission to work with employers and bargaining agents to ensure that existing seniority systems will not be a barrier to employment equity.

In *Opening Doors* the Office of the Employment Equity Commissioner commented that seniority provisions were not designed to discriminate. However, until designated group members were fairly represented in the workplace, seniority might have a discriminatory effect on these groups.[26] The Office concluded that

> Where the practice of seniority is found to be a systemic barrier, it should be eliminated and alternate [sic] and complementary forms of seniority should be negotiated. In matters of lay-off and recall, seniority can be practised in ways that reduce the impact on designated group members, such as implementing voluntary inverse seniority with compensation, job sharing or rotational lay-offs.[27]

The report continued that many unions, such as the Canadian Auto Workers, the United Steelworkers of America, and the Ontario Public Service Employees Union had developed seniority clauses which took into account employment equity objectives.[28]

ADMINISTRATION AND ENFORCEMENT

What is the composition of the Employment Equity Commission? *(s. 40)*

The Employment Equity Commission is composed of one or more members to be appointed by the Lieutenant Governor in Council (LGC). The LGC must also designate one member as the Employment Equity Commissioner.

What enforcement powers does the Commission have? *(ss. 22-24)*

The Commission has three broad enforcement powers:

- AUDIT: it may audit an employer to determine whether the employer is complying with Part III. The audit power extends to the obtaining of search and entry warrants;

- SETTLEMENT: where it is of the opinion that an employer may not be complying with Part III, the Commission may endeavour to effect a settlement;

- ORDER: the Commission may, without a hearing, order an employer to take specified steps to achieve compliance with Part III, if it considers that any of seven prescribed circumstances exist. These circumstances include failure to conduct the workforce survey or employment systems review, and preparation of an employment equity plan which does not comply with the statutory requirements.

  An order may be appealed by an employer to the Employment Equity Tribunal where it may be rescinded, varied, or confirmed. (The composition and powers of the Tribunal are discussed below.)

What other functions does the Commission perform?

General *(ss. 41,44)*

Some other functions of the Commission are:

- to further the principles of employment equity;

- to monitor the implementation of employment equity and the effectiveness of the Act;

- to conduct research and develop policy in relation to employment equity;

- to assist employers, employees, and bargaining agents in complying with Part III;

- to educate the public about employment equity; and

- to make an annual report on its activities to the Minister of Citizenship.

Policy Directives *(s. 42)*

The Commission may issue policy directives on matters related to employment equity. These directives must be considered by the Employment Equity Tribunal in making decisions.

Advisory Councils *(s. 45)*

The Minister of Citizenship may appoint one or more advisory councils to advise the Commission. An advisory council must include

- a representative of employers;
- a representative of labour; and
- a representative of the designated groups.

Applications to the Employment Equity Tribunal *(ss. 25, 32(2))*

As discussed below, the Commission may make applications to the Employment Equity Tribunal. It is also entitled, at its request, to be a party to any other application.

What is the composition of the Employment Equity Tribunal? (ss. 46-47)

The Tribunal is composed of such members as are appointed by the Lieutenant Governor in Council. One member must be designated by the LGC as the chair.

The chair may appoint panels to conduct hearings; a decision of a panel (which is composed of one or more members of the Tribunal) is a decision of the Tribunal.

Who may apply to the Tribunal, and under what circumstances? (ss. 25-31)

Applications may be brought to the Tribunal by: the Commission; any person; an employer; a bargaining agent; or an employee. Table 2 outlines the reasons for which each applicant may apply to the Tribunal.

Every application must be referred for mediation to a Tribunal employee. If the employee considers that mediation will not resolve the application, the Tribunal must hold a hearing and determine the application, unless otherwise provided by regulation.

TABLE 2
APPLICATIONS TO THE EMPLOYMENT EQUITY TRIBUNAL

APPLICANT	REASONS FOR APPLICATION
Employment Equity Commission *(s. 25(1))*	• determination of whether employer has complied with Part III.
Any Person *(ss. 26(1) and 29(1))*	• employer has failed to take steps required by employment equity plan; • employer has failed to achieve goals set out in plan in accordance with timetables; • employer has failed to implement settlement; • another person has intimidated, coerced, penalized or discriminated against applicant contrary to s. 37.
Employer *(s. 27(1) and (2))*	• employer and bargaining agent have not resolved any matter that is their joint responsibility; • employer and bargaining agent have not carried out their joint responsibilities within the time required under Part III — an application to Tribunal by employer is mandatory.
Bargaining Agent *(s. 27(1))*	• employer and bargaining agent have not resolved any matter that is their joint responsibility.
Employee *(s. 28(1))*	• employer and bargaining agent are not carrying out their joint responsibilities in good faith; • employer has not applied to Tribunal when required to do so.

There are specific procedural rules governing those instances where an employer is party to an application before the Tribunal and the subject of a Commission audit at the same time.

In the case of an application to the Tribunal, what relevance is attached to an employer's efforts to implement an employment equity plan?

The bill explicitly recognizes the importance of "reasonable efforts" where applications have been made by the Commission or any person. As explained below, reasonable efforts by the employer can be part of a defence to "deemed" non-compliance with Part III.[29]

Applications by the Commission *(s. 25(2))*

Where the Commission has made an application to the Tribunal, the employer is "deemed" not to have complied with Part III if the employer

- has failed to take steps required by the employment equity plan; or
- has failed to achieve the goals set out in the plan in accordance with the plan's timetables.

"Deemed" non-compliance, however, will not take place if the employer proves that

- the plan complies with Part III; and
- the employer made all reasonable efforts to implement the plan and to achieve its goals in accordance with the timetables.

Applications by Any Person *(s. 26(2))*

The same defence (i.e. Part III compliance and reasonable efforts) is available to an employer where a person's application alleges a failure to achieve the goals set out in the plan in accordance with the timetables.

What kind of decision-making powers does the Tribunal have?
(ss. 28(2), 29(2), 33, 34)

In any application, the Tribunal may make such orders as it considers just, including any of the following:

- an order establishing or amending an employment equity plan;
- an order requiring an employer to create an employment equity fund to be used as specified in the order; and
- an order appointing an administrator who, at the employer's expense, is responsible for developing, implementing, reviewing, and revising the employer's employment equity plan.

In the case of an application by an employee or a person alleging intimidation (the offence of intimidation is outlined below), the Tribunal's power to "make any order it considers just" is specifically defined to include such things as:

- removing or modifying a term in the employment equity plan that in the Tribunal's opinion was not included in good faith (employee application);
- requiring the payment of compensation to the applicant (application re: intimidation).

The Tribunal also has a reconsideration power — that is, when considered advisable, it may reconsider any decision or order and vary or revoke it. Otherwise, decisions or orders of the Tribunal are final and conclusive for all purposes.[30] (Other powers of the Tribunal — specifically, its powers on an appeal from a Commission order — were discussed earlier.)

What offences does the bill create? What penalties may be imposed?
(ss. 35-39)

Offences under the bill include:

- disclosing information collected from employees under Part III, except for the purpose of complying with Part III or IV;

- obstructing a Commission employee in the execution of a warrant or impeding an employee in the course of an audit;
- intimidating, coercing, penalizing, or discriminating against another person because that person, among other things
    - is exercising a right under the *Employment Equity Act*;
    - is participating in a proceeding under the Act; or
    - has sought the enforcement of the Act or an order;
- failing to comply with an order of the Tribunal.

The prosecution of an offence requires the written consent of the Tribunal. Upon conviction, the offender faces a maximum fine of $50,000.

OTHER ISSUES

Does the bill incorporate a "contract compliance" model of employment equity? (s. 49)

Yes. It is a condition of every government contract, grant, or loan that every other party to the contract, or the recipient of the grant or loan, must comply with Part III to the extent of its obligations under that Part.

The bill then defines what constitutes "conclusive proof" of a breach of this condition. Such proof lies in a finding by the Employment Equity Tribunal that Part III has been breached. The breach entitles the government to cancel the contract, grant, or loan and to refuse to enter into any further such arrangement.

How does Bill 79 interact with the Human Rights Code?

Two ways in which Bill 79 makes reference to the *Human Rights Code* are:

- by amending the *Code* directly. Amendments pertain to "special programs" and referrals between the Human Rights Commission and the Employment Equity Commission; and

- by stating that certain conduct under the *Code* does not constitute a breach of the bill.

Amendments to the *Code* *(s. 51)*

Employment Equity Plans

The basic right against discrimination in employment is found in s. 5(1) of the *Human Rights Code* which reads

> Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

The *Code* further stipulates that this right is not infringed by a "special program":

> 14(1). A right under Part I [which includes s. 5(1)] is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

Bill 79 amends the *Code* to state that an employment equity plan shall be "deemed" to be a special program if the Employment Equity Tribunal has determined, or the Employment Equity Commission certifies, that the plan complies with Part III of the bill.

Referrals between the Human Rights Commission and the Employment Equity Commission

Bill 79 also amends the *Code* to require the Human Rights Commission to refer a complaint of discrimination to the Employment Equity Commission under the following circumstances:

- the complaint is made against an employer who has an employment equity plan; and
- it appears to the Human Rights Commission that the complaint arises from a practice that is addressed in the plan.

The Employment Equity Commission must then inquire into the complaint, and must direct that no further action be taken, if it is satisfied of four things:

- the complaint arises from a practice that is addressed in the employer's plan;
- the plan complies with Part III of the bill;
- the plan addresses the practice in a reasonable manner and over a reasonable period of time; and
- the employer is making all reasonable efforts to implement the plan and to achieve the plan's goals in accordance with the timetables set out in it.

If these four conditions are not satisfied, the Employment Equity Commission must promptly refer the complaint back to the Human Rights Commission. That Commission would have to resume its investigation of the complaint and its efforts to effect a settlement.

Applicability of Exceptions under the *Human Rights Code* *(s. 5(1))*

The *Code's* right to equal treatment in employment is subject to various exceptions, apart from the "special programs" exception discussed above. For instance, s. 11 of the *Code* on constructive discrimination[31] makes an exception where the qualification in question is reasonable and *bona fide* in the circumstances — in such cases, the right

against employment discrimination is not infringed. Other exceptions to the *Code's* right to equal treatment in employment include:

- where the individual cannot, because of that person's disability, perform the essential duties of the job and cannot be accommodated without undue hardship (s. 17);
- under certain circumstances, religious, philanthropic, educational, fraternal or social institutions or organizations (s. 24(1)(a)); and
- where the discrimination is for reasons of age, sex, record of offences or marital status if such a characteristic is a reasonable and *bona fide* qualification because of the nature of the employment (s. 24(1)(b)).

Bill 79 states that conduct under these provisions is not a breach of the bill:

> 5(1). It is not a breach of this Act to give a preference in hiring or to deny employment to someone if the preference or denial is one that is permitted under the *Human Rights Code* by section 11 (constructive discrimination), section 17 (handicap) or clause 24(1)(a) or (b) (special employment).

Draft Regulation and the *Human Rights Code* *(Dr. Reg., s. 20)*

The Draft Regulation stipulates that the measures set out in the employment equity plan that are designed to accommodate persons with disabilities must be developed and implemented in accordance with the *Human Rights Code*.

Does the bill provide for any kind of legislative review? *(s. 52)*

Yes. S. 52 says that a Committee of the Legislative Assembly must undertake a comprehensive review of the Act and the regulations within five years of s. 52 coming into force. Within one year after beginning that review, the Committee must make recommendations to the Assembly regarding amendments to the Act and the regulations.

A similar provision has appeared in other legislation. The *Freedom of Information and Protection of Privacy Act*, for instance, required the Standing Committee on the Legislative Assembly to conduct a review of that Act.[32]

When does the bill come into force? (s. 53)

The *Employment Equity Act* will come into force on a day to be named by proclamation of the Lieutenant Governor.

FOOTNOTES

[1] The principal source of information on this and other aspects of Bill 79 was the bill itself. Other sources included: Ontario, Legislative Assembly, *Compendium: Employment Equity Act, 1992*, 35th Parliament, 2nd Session, Sessional Paper No. 99, tabled 25 June 1992; Juanita Westmoreland-Traoré, "Overview of Bill 79: An Act to Provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women," in *1993 Institute of Continuing Legal Education: Proceedings of the Constitutional Section — Human Rights and Wrongs - Unravelling the Maze*, in Toronto, 28 January 1993, the Canadian Bar Association - Ontario (Toronto: Canadian Bar Association - Ontario, 1993) -- Ms. Westmoreland-Traoré is the Employment Equity Commissioner for Ontario; and Cheryl J. Elliott, *Ontario's Equity Laws: A Complete Guide to Pay and Employment Equity* (Aurora: Canada Law Book, 1992).

[2] A discussion paper released by the Office of the Employment Equity Commissioner defines systemic discrimination in the workplace as policies or practices which may be harmless in their intent, but which have a relatively greater negative effect on designated group members, and which are not really necessary to meet the requirements of the job. As an example of this kind of practice, the paper cites word-of-mouth-hiring as the main recruitment practice of an employer. It explains:

> Word-of-mouth hiring may not reach designated group members who do not know anyone in the company. When employers look for a job candidate inside their workplaces, they would not be able to hire designated group workers who are not there in the first place. . . . Racial, cultural, gender stereotypes, and stereotypes relating to disabilities may influence who will be specifically spoken to or recruited, or who will specifically be excluded. . . .

See Ontario, Office of the Employment Equity Commissioner, *Working Towards Equality: The Discussion Paper on Employment Equity Legislation* (Toronto: Queen's Printer, 1992), p. 4.

[3] Part I of the *Constitution Act, 1982* (R.S.C. 1985, Appendix II, No. 44), s. 15(2). There is some debate over the significance of "object" in s. 15(2) and whether or not the section requires an assessment of the effects of a special program, law, or activity. See, for example, Colleen Sheppard, *Litigating the Relationship between Equity and Equality*, study paper prepared for the Ontario Law Reform Commission (Toronto: The Commission, 1993), pp. 30-35; and Dale Gibson, *The Law of the Charter: Equality Rights* (Toronto: Carswell, 1990), pp. 301-303. Sheppard writes that "most judges are interpreting section 15(2) so as to require an assessment of the effectiveness, fairness, and reasonableness of a special program, law, or activity. . . . Nevertheless, the question whether the effects are to be scrutinized remains an open one . . . ." (pp. 32-33).

[4] R.S.O. 1990, c. H.19.

[5] R.S.O. 1990, c. P.15.

[6] O. Reg. 153/91, s. 1(1).

[7] R.S.O. 1990, c. P.7.

[8] Bill 172, the *Employment Equity Act, 1990*, 2nd Sess., 34th Leg. Ont. 39 Eliz. II, 1990 (first reading 29 May 1990), s. 3(1).

[9] Ontario, Office of the Employment Equity Commissioner, *Opening Doors: A report on the Employment Equity Consultations*, rev. ed. (Toronto: Queen's Printer, 1992), pp. 18-19. The discussion paper *Working Towards Equality* of November 1991 served as the basis for the consultations.

[10] The Office of the Employment Equity Commissioner has given examples of various employment equity measures. The following examples were raised in the Office's discussion paper and by participants in its consultation process. **Barrier elimination measures**, for instance, include: barrier-free interviewing to ensure all questions are job-related and free from racial, gender and disability bias; and the fair assessment of prior learning, foreign credentials, and work/volunteer experience and skills. Examples of **positive measures** are: job advertising in designated group community media; and lateral entry whereby designated group members are recruited in positions with increased responsibilities and which can be above the entry level. Some **job accommodation measures** are: work-related assistive devices; access to trained interpreters; and visual alarm systems. See *Working Towards Equality*, pp. 34-36, and *Opening Doors*, pp. 52-55.

[11] Office of the Employment Equity Commissioner, *Opening Doors*, p. 51.

[12] Ibid. In *Working Towards Equality* the Office of the Employment Equity Commissioner pointed out that when a quota is met, the assumption is that no further effort is needed. However, meeting a numerical goal implies not only that an objective can be reached, but also that it can be surpassed (p. 21).

[13] Bill 172, s. 3(2).

[14] Ontario, Ministry of Citizenship, *Employment Equity: Guide to the Draft Regulation To accompany Bill 79* (Toronto: Queen's Printer, 1993), pp. 6-7.

[15] *Consultation Draft: Regulation for Bill 79, An Act to Provide for Employment Equity for Aboriginal People, People with Disabilities, Members of Racial Minorities and Women* (June 1993), s. 19(1). The Draft Regulation (s. 1, Schedule) lists 14 occupational groups: Senior Managers; Middle and Other Managers; Professionals; Semi-Professionals and Technicians; Supervisors; Foremen/Women; Administrative and Senior Clerical; Sales and Service - Skill Level III; Skilled Crafts and Trades; Clerical; Sales and Service - Skill Level II; Semi-Skilled Manual Workers; Sales and Service - Skill Level I; and Other Manual Workers. The Regulation (s. 22) also defines "geographical areas" as the "census metropolitan area" or "census agglomeration" in which a workplace is located. In the case of other workplaces, it is the "upper tier municipality" in which they are situated.

[16] Ibid., s. 20(2). The subsection begins:

> The measures set out in the plan that are designed to accommodate persons with disabilities shall include the following types of accommodation that are necessary to meet the objectives [for qualitative measures] set out in subsection 19(1) and comply with the employer's obligations under subsection (1) [implementation in accordance with the *Human Rights Code*] . . .

[17] Ibid., s. 21(2).

[18] Ibid., s. 23.

[19] *Guide*, p. 9.

[20] Ibid.

[21] O. Reg. 153/91, ss. 5-9. There are further plan requirements in ss. 10-14 involving accountability mechanisms. S. 10, for example, states that every plan must provide for the evaluation of the performance of senior officers and senior managers in the implementation of the plan; the rewards to be offered for excellent performance; and the sanctions to be applied in the event of unsatisfactory performance.

[22] Ibid., s. 5(6). The regulation states that for each composition goal for a prescribed group, the police force must set a hiring goal. In general, the hiring goal for a prescribed group must, at a minimum, be equal to its community representation. Position goals are set by police forces that have 50 or more employees, and are based on the same principle of mirroring representation in the community.

"Community" is basically defined in the regulation as those persons between 15-64 years of age (a) in the area served by the police force; and (b) on reserves within 60 kilometres of that area. See the definition of "representation in the community" in s. 1(1).

[23] The Draft Regulation does not actually require the reports to be submitted to the Employment Equity Commission. The *Guide* explains that "to streamline the monitoring process, employers will submit copies of their employment equity reports only if they are requested by the Employment Equity Commission" (p. 14). Certificates filed with the Commission must include a statement of where the Commission may obtain a copy of the reports. See ss. 49(2)(e) and 49(3)(d) of the Draft Regulation.

[24] The membership of the coordinating committee is different under the Draft Regulation. S. 32(3) states that the committee "shall be composed of one representative of each of the bargaining agents and a number of representatives [not just one] of the employer not to exceed the total number of representatives from the bargaining agents."

[25] See Juanita Westmoreland-Traoré, Speech presented at the Municipal Employment Equity Network Conference, Pickering, 10 June 1993, p. 17. After mentioning these other areas, Ms. Westmoreland-Traoré explained that "if seniority is a systemic barrier, measures will be designed jointly with the union so that seniority and equity can be practised together" (p. 17).

[26] Office of the Employment Equity Commissioner, *Opening Doors*, p. 41.

[27] Ibid. In *Working Towards Equality* the Office of the Employment Equity Commissioner commented that employment equity and seniority systems could complement each other. Examples included: "plant-wide seniority, rather than departmental seniority, portable seniority among bargaining units usually with the same employer, constructive seniority where seniority is 'built' as a remedy in cases of proven discrimination, and measures to facilitate direct entry into positions above entry level" (p. 29).

[28] Office of the Employment Equity Commissioner, *Opening Doors*, pp. 41-42. A collective agreement between Management Board of Cabinet and the Ontario Public Service Employees Union addressed the issue of seniority and employment equity as follows:

> **ARTICLE 4 - POSTING AND FILLING OF VACANCIES OR NEW POSITIONS**
>
> .....
>
> 4.3.1 In filling a vacancy, the Employer shall give primary consideration to qualifications and ability to perform the required duties. Where qualifications and ability are relatively equal, seniority shall be the deciding factor.
>
> 4.3.2 Notwithstanding subsection 4.3.1, the Union and the Employer may agree that employment equity shall be the overriding consideration. Such agreements will be made in advance of job postings and may be based on individual positions, groups of positions, classifications or other groupings of jobs as appropriate.
>
> 4.3.3 Agreements under subsection 4.3.2 will be based on an analysis of workforce data and employment systems indicating that a designated group is or groups are under represented.
>
> 4.3.4 It is recognized that in accordance with section 14 of the Ontario Human Rights Code, the Employer's employment equity program shall not be considered a contravention of this article.
>
> .....
>
> [Note: There are separate provisions in Article 4 on the assignment of an employee to a vacancy.]

Source: *Collective Agreement with respect to Working Conditions, Employee Benefits and Salaries between Management Board of Cabinet and Ontario Public Service Employees Union*, January 1, 1992 to December 31, 1993. No changes have since been made to

article 4 as a result of the social contract process. Telephone interview conducted by Edward Israel, Research Assistant, Legislative Research Service, with Joyce Hanson, Acting Head, Collective Bargaining, Ontario Public Service Employees Union, 11 August 1993.

A collective agreement entered into by the United Steelworkers of America included the following provision:

> 1.08 In all cases of vacancy, promotion, transfer, layoff and recall from layoff, First Nations or native employees shall be entitled to preference provided they have the ability to perform the work notwithstanding their seniority.

Source: *Collective Agreement between Placer Dome Inc. Dona Lake Mine and the United Steelworkers of America on its own behalf and on behalf of its Local 8533*, August 25, 1991 to August 24, 1993. See also arts. 1.06, 1.10, and 1.14. (Note: The mine closed prior to the expiry of the agreement.)

[29] Reasonable efforts by an employer can also be a factor when a complaint of discrimination has been referred from the Human Rights Commission to the Employment Equity Commission. See the discussion on s. 51(3) of the bill which deals with the relationship between Bill 79 and the *Human Rights Code*.

[30] The finality of the Tribunal's orders is qualified by the supervisory power of the courts over administrative tribunals under principles of administrative law. See, for example, Elliott, *Ontario's Equity Laws*, section 22.17, "Orders of the Tribunal."

[31] In essence, the doctrine of constructive discrimination holds that even in the absence of an intent to discriminate, a practice or rule can be discriminatory by virtue of its effect. In general, in order to make out a case of constructive discrimination, the complainant must demonstrate that the group to which he or she belongs displays a certain characteristic and that the rule or practice adversely affects the group because of that characteristic. It is a defence that a rule or practice is reasonable and *bona fide*. This defence, however, will not succeed if the needs of the complainant's group can be accommodated without undue hardship. See Ontario, Ministry of Citizenship, Working Group on Employment Equity, *Impact of the Ontario Human Rights Code* (1989), pp. 1-16.

[32] R.S.O. 1990, c. F.31, s. 68. The section read:

> The Standing Committee on the Legislative Assembly shall, on or before the 1st day of January, 1991, undertake a comprehensive review of this Act and shall, within one year after beginning that review, make recommendations to the Legisative Assembly regarding amendments to this Act.

Three differences between s. 68 and s. 52 of Bill 79 are: the review of the *Freedom of Information Act* had to commence within three years of the Act coming into force; a

specific Committee of the Assembly was mandated to conduct that review; and s. 68 made no reference to the regulations.

APPENDIX

"Coverage: Number and Percentage of Employers and Employees"

(Source: Ontario, Office of the Employment Equity Commissioner, *Opening Doors: A report on the Employment Equity Consultations* (1992), Appendix C, p. 81)

APPENDIX C:
COVERAGE: NUMBER AND PERCENTAGE OF EMPLOYERS AND EMPLOYEES